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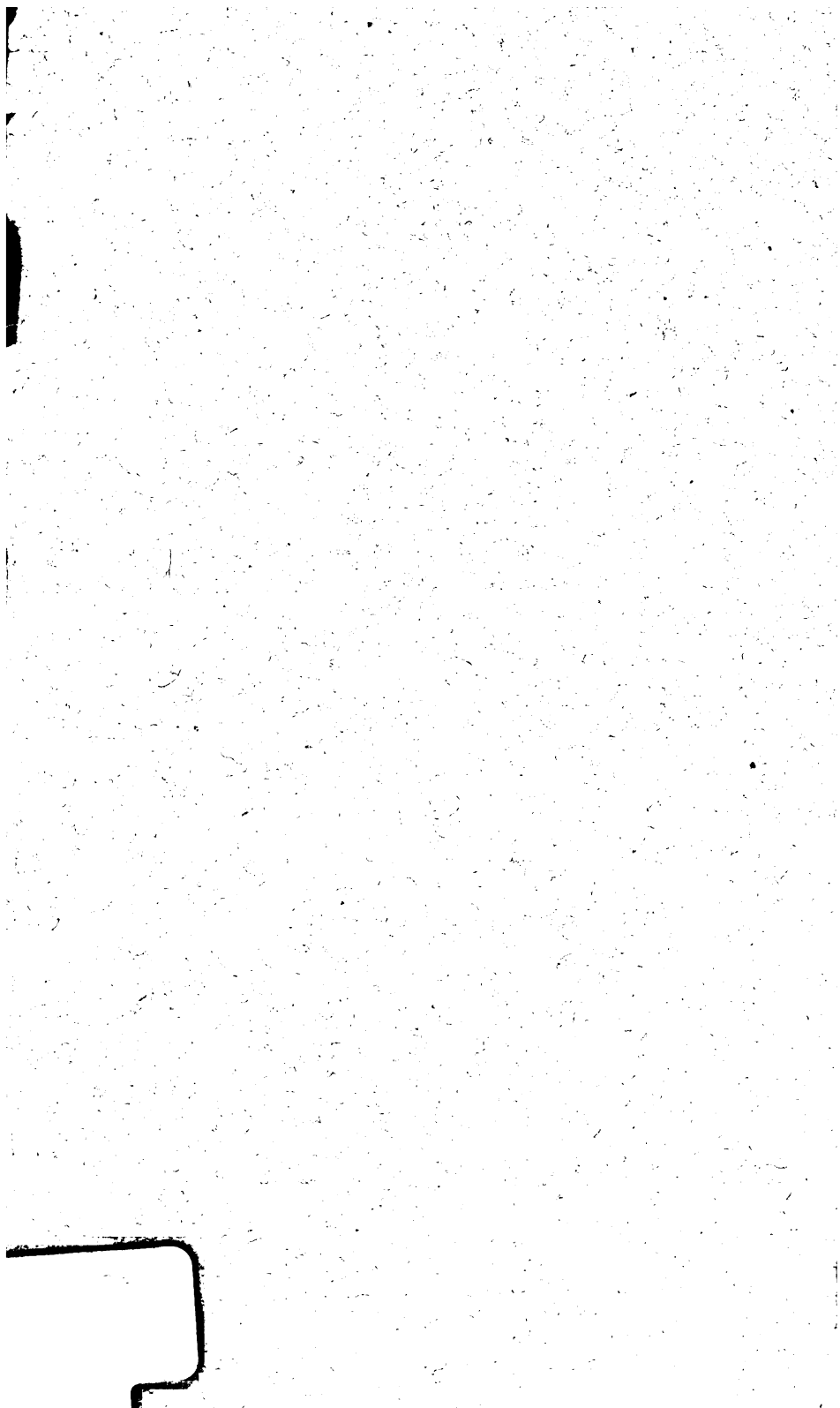
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From the Mormon Church.
377 Blue Dec. 16, 1893

LETTER

TO THE

106163

Secretary of the Interior

ON,

The Affairs of Utah, Polygamy,
"Cohabitation," &c.

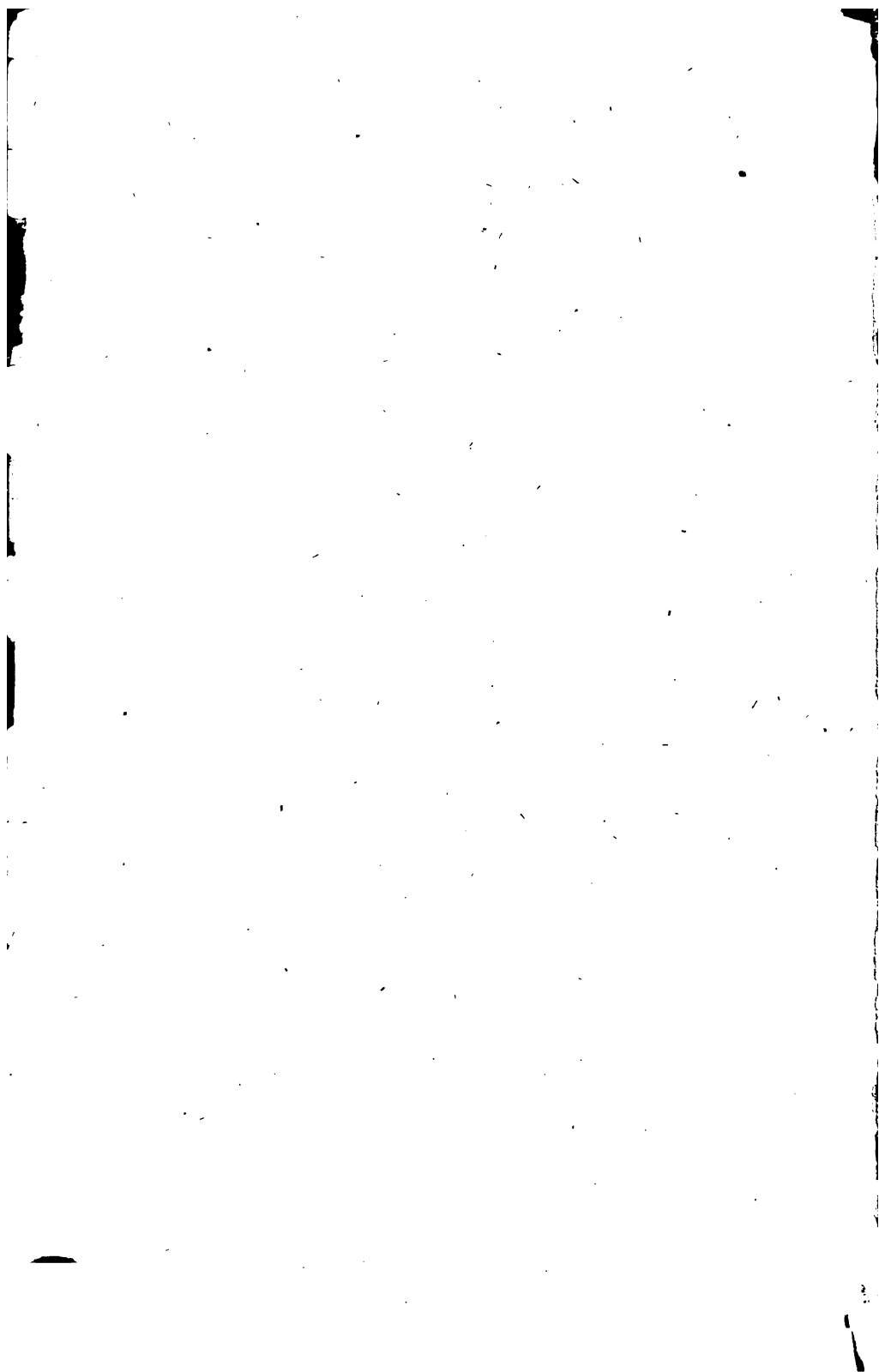
BY

GEORGE TICKNOR CURTIS.

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WASHINGTON, D. C., November 1, 1886.

To the Hon. L. Q. C. LAMAR,
Secretary of the Interior.

SIR : No apology can be necessary for this communication, or for the public manner in which it is addressed to you. It concerns a matter of the utmost importance to the people of the United States, and to that portion of their affairs which is under your official charge. The recent report of Governor West, Territorial Governor of Utah, dated at Salt Lake City, and the last report of the "Utah Commissioners," both of them official documents addressed to the Secretary of the Interior, seem to me to call for examination and comment. They open the policy of this government towards the Mormons of Utah, as it has been pursued for the past few years, and they advocate measures of still greater severity in the same direction. I have felt prompted to give a great deal of attention to the measures pursued towards the Mormons of Utah, on account of the principles of civil and religious liberty involved; and I have given a great deal of study to the laws that have been enacted respecting them, and to the policy which is pursued towards them. Some of the convictions which I entertain I desire respectfully to submit to you.

In the course of the past summer I had occasion, in writing to President Taylor, the head of the Mormon Church, to ask a certain question, and to request him to allow me, in case I should find it necessary, to publish his answer. I received from him, under the date of August 3, 1886, a letter, from which I now, with his permission, make an extract that is, I think, deserving of the serious attention of all who are concerned in administering the Federal Government, and more especially of the Secretary of the Interior. You will perceive, sir, that the answer was given most directly and plainly, and

that it came from one who is entitled to speak the sentiments and feelings of the Mormon people of Utah. He gives to the imputation of disloyalty just the denial that was to be expected from him. The reason why I put to him the question which he answered was because I have long foreseen, from the spirit that prevails among the non-Mormons of that Territory, and from the tendencies that are manifested in Congress to allow of measures dictated by that spirit, that the time may not be distant, if it has not already come, when an attempt will be made to force upon the Mormons the alternative that I suggested. The following is Mr. Taylor's answer :

“ The question which you propound, as to what we contemplate doing in case we are driven to the wall, and have the alternative presented to us of a surrender of our religious convictions and our civil rights, or another exodus, is one that we can freely answer. We may find it convenient to form colonies outside the boundaries of the United States. But we have never contemplated such a movement as an exodus *en masse* from these Mountain Valleys. The gathering of the people together is one of our fundamental doctrines, and this continent is the place upon which we are commanded to gather. Our future is indissolubly connected with this land. We have had many suggestions about moving on to islands and other places ; but such a movement for us is entirely out of the question. Having these views, where could we move to as a body ? Notwithstanding the many slanders circulated concerning our loyalty, we are profoundly attached to our Republic. We believe that it was founded by the Almighty through chosen instruments, and that the men who framed the Constitution were inspired of God in their labor in framing that instrument. All the liberty that we, or any other reasonable being can ask, can be enjoyed under that great charter, when its guarantees are properly observed. If, with the hope of destroying us, our fellow-citizens continue to trample upon our rights, guaranteed by that instrument, we must continue to bear

it as patiently and heroically as we can, doing all in our power to protest against these wrongs, and to obtain our rights in the courts of our country, and trusting in our God for that deliverance which He has never failed to give us in the past, and which He has promised us for the future. Our destiny is interwoven with the Republic of the United States. For upwards of half a century, we have been led to expect that such attacks as we now witness would be made upon us, and that the people in power would attempt our destruction as a Church and a community. We have expected, also, that the day would yet come, when it would fall to us to uphold the Constitution and constitutional government in this country. We fully believe that this high honor is in store for us, and we are sustained in the midst of our present persecutions by the consciousness that there is a divine providence in all that is taking place, and that our God will so control events that we, as a people, shall be purified and His purposes be brought to pass through the events that are now taking place.

“Much more might be said upon this subject, but from the above you will learn our views sufficiently to form an idea of our position. We cannot surrender our principles, nor yield our religious convictions; but shall contend for our rights as American citizens inch by inch as long as God will give us strength and ability to do so. We shall do this, not for ourselves alone, but for humanity, that the principles of civil and religious liberty may be fully maintained on this great American Continent.”

From this extract it will be apparent how deep are the religious convictions of these people. We may call such convictions' fanaticism. We may deride the idea of their being specially commanded by the Almighty to gather on this continent, and their being guided by a special Providence, as an absurd assumption. It matters not what we think of their beliefs. The question for the statesman—for the people and Government of the United States—is what these Mormons be-

lieve, and not what we believe. Of their sincerity it would be idle to entertain a doubt. If they believe themselves to have been inspired by God to hold certain religious opinions, they do no more than many other Christians do who regard the framers of our Constitution as inspired in their labor of framing that instrument. In dealing with those whom we choose to consider as "fanatics," the very first and the very last thing to be remembered by any government is that what is called religious fanaticism is a great force ; that in many ages of the world it has caused men and women to meet any extremity of suffering rather than surrender their religious convictions. This tenacity of the human soul, by which it adheres to conscientious religious beliefs, challenges, or ought to challenge, the respect of rulers in any country, and more especially in this ; and it has been because it has not always been respected, and because what is now foolishly advocated as "the stamping out" process has been resorted to, that religious persecution has left so many dark and lamentable records on the pages of history. Our own history is stained by more than one such record. This affords no reason why the civil power should not prohibit a practice that is injurious to the welfare of society, although that practice is, by those who follow it, founded on and dictated by a sincere religious belief. But it affords ample reason for a careful discrimination between that which the civil power may and that which it may not rightfully punish or control by the hand of the law. This depends in our country upon the limitations imposed by constitutional provisions upon the authority of Government.

You, Mr. Secretary, will not be likely to impute to me any disposition to set up the religious convictions of men in opposition to the law of the land. I have had too extensive and too close an observation of the fallacy of the so-called Higher Law to be for one moment misled by that specious doctrine. I lived and acted through the whole of that period when men of all grades of intellect deluded themselves with

the idea that what they considered the law of God absolved them from obeying the laws regularly enacted by human authority ; when men who aspired to be, and who supposed themselves to be, statesmen, and were so considered, toyed and coquetted with the doctrine of the supposed Higher Law, and thereby contributed their influence to debauch the public mind and to uproot the foundations of civil obedience. In that long warfare between truth and error I bore my part, always maintaining that there is but one measure of the duty of the citizen, namely, to obey the law as enacted by competent authority, whatever his convictions of the moral rightfulness of that law, and to seek redress or relief from its requirements in the courts. It was because multitudes would not see this, but insisted that their interpretation of the law of God absolved them from obeying human laws which they did not like, that a confusion of ideas respecting civil obligation largely contributed to bring about the state of things in certain regions of our land that preceded our civil war.

But this is not the attitude of the Mormons. They are not believers in the Higher Law as a means of absolving them from obedience to the law of the land. Whoever imputes this to them makes a great mistake. All they ask of us is that in the interpretation and administration of our laws we shall not violate their religious freedom and trench upon their rights of conscience. That we have hitherto suffered our laws to be so interpreted and administered as to violate their religious freedom and trench upon their rights of conscience I shall make plain beyond peradventure. I shall show that Mr. Taylor is entirely right in anticipating that he and his fellow-believers will be forced to become the champions of civil and religious liberty in this country if there is not a change of policy ; that this is not an attitude in which they will affect to stand for the purpose of enacting the part of pretended martyrs, but that it is one in which they will inevitably be placed if we go on as we have begun, and that at the same time there is no necessity for such an issue.

The following passage from the report of Governor West calls for a somewhat extended comment :

"The all-absorbing question in this Territory, dominating all others, hurtfully affecting its prosperity, impeding its advancement, and disturbing the quiet and happiness of its people, and the one question of the utmost concern and solicitude to the whole country, *is the attitude of defiance assumed and maintained by the Mormon people, who probably are five-sixths of the whole population, to the law of Congress for the suppression of polygamy, known as the 'Edmunds law.'* In all questions affecting the Mormon Church and people, the polygamous and monogamous Mormons make common cause, stand together, and are united. They maintain publicly through their leaders and teachers, in their houses of worship, through their press, and privately in social and business circles, *that the law is infamous, an interference with and a denial to them of that religious freedom guaranteed to all by the Constitution; of their right and religious duty to continue in violation of the law their polygamous relations, and they deny the authority of Congress to regulate and interpose any restrictions as to the marital relation; that the obedience which they owe and will cheerfully render to a power higher than any earthly power compels them to exercise their religious rights and privileges in the place of and in violation of the law; that they are prepared to, and will if required of them, sacrifice their personal comfort, their property, suffer indefinite imprisonment, and surrender life itself rather than yield and promise obedience to the law and forego the privileges they claim.* The Government can have and hold but one position towards this people, which is of easy statement: Its authority must be respected, its laws must be obeyed."

I have italicised some of the language of this sweeping statement in order to direct attention specially to some of its charges. The very serious indictment which the Governor brings against 150,000 people contains the following charges:

1. That the Mormon people, five-sixths of the whole population of Utah, are in "an attitude of defiance" to a statute of the United States passed "for the suppression of polygamy."

2. That they maintain everywhere and at all times that this law is "infamous;" "an interference with and a denial to them of that religious freedom guaranteed to all by the Constitution."

3. That "they deny the authority of Congress to regulate and interpose any restrictions as to the marital relations."

4. That they set up their convictions of a law higher and more sacred than human law as the ground for refusing to promise obedience to the law of the land, and for suffering

imprisonment and even death itself rather than forego "the privileges [which] they claim."

I deny the justice and truth of this accusation in every one of its specifications. I repel the charge that the Mormons are in an attitude of defiance to the law for the suppression of polygamy. I deny that they are believers in the Higher Law as a source from which they can claim peculiar "privileges" or immunity from the consequences of what is made an offence by the law of the land. I shall now proceed to prove that the Governor has, unintentionally no doubt, misrepresented them; that his misrepresentation is a consequence of his having overlooked the distinction between what they admit the civil power can and what they claim it cannot require of them.

In order to make this clear I must now quote two other paragraphs from his report which follow immediately after that above given :

"In the year 1884 a determined move was inaugurated for the enforcement of the law against polygamy, and since that time the territorial officers of Federal appointment charged with the duty have been and continue vigilant and diligent in their efforts to that end. The district and supreme courts have been open and promptly disposing of business before them. While vigor has been shown in the prosecution of offenders, it has been and continues to be the custom of the court, after conviction, to suspend the judgment and allow the convicted party to go free upon his simple promise that he will in the future obey the laws. Of the number convicted up to the 30th of June, 1886, but 7 have given the promise and accepted freedom.

"Seven days after assuming office in the Territory, on the 13th day of May, after consultation with Chief-Justice Zane and District Attorney Dickson, they approving and concurring, I visited the penitentiary, where about 50 of those convicted under the law were imprisoned, and proposed to all who would promise to obey the laws in the future our united efforts to secure from the President their pardon. Not one of them availed himself of this tender, but sent me a respectfully worded communication, signed by all, declining to do so."

If the Governor, when he visited the penitentiary with the approval, be it observed, and the concurrence of the chief-justice and the district attorney, put to a single convict who was there undergoing imprisonment because he had been convicted of bigamy in having married more than one wife, the question whether he would obey the law and not repeat that offence, I take leave to doubt whether he received a

negative answer from a single one of them, or from the whole collectively. If, as a condition of receiving a pardon from the President, he put to them or any of them the question whether they would promise to obey the laws in the future, in the sense of accepting the construction given by the territorial courts to the section of the statute which punishes "cohabitation with more than one woman," without an effort to obtain a revision of that construction by the Supreme Court of the United States, I think it very likely that they one and all refused to comply with such a condition of obtaining a pardon. I read their formal reply to the Governor, and I know that this was what they understood was required of them, and I know, too, that they would not have been MEN if they had submitted to it. The fact that the chief-justice and the district attorney concurred in the Governor's visit and his offer shows that although not present they were parties to this proceeding. They had nothing else to offer to the prisoners who had been convicted of unlawful cohabitation. To these persons, the requirement was that they should promise "to obey the laws" as they have been construed by the chief-justice and his brethren; and while I shall not say that this construction is an "infamous" one, I shall say that it is forced, artificial, unnatural, and oppressive; and that to require citizens of the United States, who happen to dwell in a Territory, to promise to obey the laws, when so construed, while the door of access to the Supreme Court of the United States is closed and kept closed against them, when the offence is a new one, when it is couched in one ambiguous word, and when the construction of the lower courts requires of them a renunciation of religious and moral duties, is a cruel proceeding. Torture by the rack, as a means of extorting a renunciation of religious beliefs, was once practised, and is justly held to have been "infamous." This was torture by physical pain. There may be a moral torture that should not less be condemned. When a man is in the penitentiary of a Territory,

suffering imprisonment for an offence against the United States that is entirely new, to tell him that the condition on which he can have the President's pardon is that he shall promise to obey the laws as they are construed by a set of local judges, over whose decisions there is no appellate jurisdiction, and when obedience to the law, as so construed, requires him to renounce religious and moral duties to others who are dependent on him, is to subject him to a moral torture worse than any physical pain to which the human frame can be subjected. I say that the men who rejected this offer would not have been MEN if they had embraced it, and I honor them for their refusal. This, Mr. Secretary, is strong language. I proceed to its justification.

The Governor states that he saw and conversed with about 50 "of those convicted under the law," and that he proposed a certain condition to "all," namely, that they "would promise to obey the laws in the future." He does not say of what particular offence these fifty persons had been convicted. The statute covers two offences: One is bigamy, or the having married more than one wife; the other is "cohabiting with more than one woman." They are distinct offences, separately punished. The one requires no special interpretation. A man is a bigamist who has married more than one woman. The other offence requires very careful judicial interpretation, for Congress has not defined it. It is described by the single word "cohabit," which means to live with in the same place or in the same tenement; but the territorial judges say that it means to associate with in any way or manner, no matter in what place.

Now, what was the state of things when Governor West visited the penitentiary? There were a few convicts who had been convicted of bigamy and sentenced for that offence. But the great majority had been convicted of unlawful "cohabitation;" and, of these, many, and notably "Apostle Snow," had been convicted upon a state of facts which showed that the whole association, or continuance of per-

per-

sonal relations, between the man and all of his wives but one had, since the passage of the Edmunds act, been confined to looking after their support in sickness and in health, and caring for their children, without dwelling in the same house, or, in some cases, in the same town.

No public question has arisen in my time on which the general public have so little means for forming safe opinions as they have on what is called the "Mormon question." To most persons the practise of polygamy is all that is supposed to be involved in this matter. Very few of the most intelligent people have any comprehension of the problem in statesmanship and jurisprudence which has come about in consequence of the omission of the Federal Government to deal with polygamy in the Territories at an earlier period, when the whole question was much more simple than it is now; when there were fewer persons to be affected, and when there had not come into existence many thousands of offspring of polygamous marriages, now constituting about one-fifth of the whole population of Utah. Very few people in the country at large understand the circumstances which have caused intelligent and virtuous women to enter into plural marriage, a connection that is just as voluntary as any other form of the marriage relation. The relation of plural wives to one husband is just as holy and innocent, according to the Mormon religious belief, as the relation of marriage between one woman and one man. No one can understand this peculiar moral phenomenon without referring to the religious belief of the people called Mormons, and no one can perceive the true limits to public interference with these relations without knowing what the religious belief of these people is, and how it originated. This is the first time that a public question has arisen since the adoption of the first amendment of the Federal Constitution, in which the meaning and operation of the religious liberty guaranteed by that amendment have come into legislative and judicial consideration. The question of slavery in the Territories of the United States, the

W. F. O. U.

vexatious question of our ante-bellum period, was a purely civil and political matter not complicated by the element of religious belief; for, although some of the defenders of African slavery undertook to justify it on what they deemed religious grounds, it was never necessary for the Federal Government to recognize that justification. It is far otherwise in regard to polygamy in the Territories as a form of the marriage relation; for although it is undoubtedly competent to the civil power to regulate the marriage relation wherever it has a plenary legislative authority, yet the institution of marriage, whether monogamous or polygamous, has in it a religious element, and by the accepted ideas of all persons professing in any form the Christian religion, this institution of marriage has a religious sanction. To the extent that the marriage relation is not recognized as having a religious sanction, to the extent that it is regarded as a mere civil contract, the bonds of matrimony are the more loosely assumed and the more readily dissolved; and although the civil power, in legislation, can deal with this social relation only or chiefly as one of a civil nature, yet it is always necessary to keep in view the fact that the parties who enter into this relation may, and for the most part do, recognize it as having a religious sanction and a religious origin. It may therefore happen, and in regard to these Mormons it has happened, that there is one domain of personal conduct in which the civil power can rightfully dictate what shall be prohibited because it is injurious to the welfare of society, while on the other hand there is a much wider domain of personal conduct in which there can be no interference by the civil power without trenching on the rights of conscience which are secured by an express constitutional provision. To draw the line between that individual conduct which the civil power may prohibit or punish, and that which it may not, is not attended with insuperable difficulties, but it has now become, in the case of these Mormons, imperatively necessary.

For example, in certain cases that came before the Supreme Court of the United States at its last term, under the statute known as the "Edmunds act," enacted by Congress in 1882, the highest appellate tribunal in the country was called upon to define the kind of conduct which the civil power can, and that which it cannot, punish with fine and imprisonment. The act of 1882, designed to amend an act passed in 1862—which earlier law made polygamy bigamy, and punished it as such—contained a further provision punishing any man who should "cohabit with more than one woman." No legislative definition of the word "cohabit" was given; it was left to judicial interpretation. Ordinarily, cohabitation of a man with more than one woman, in a penal statute, would be understood by lawyers and publicists as the dwelling together in a habit of sexual intercourse, or in the ordinary relations of husband and wife. But in *Angus M. Cannon's* case, which was the first one that came before the Supreme Court, it was held that the fact of sexual relations was not necessary to constitute the offence; that the offence was complete when a man dwelt under the same roof with two women whom he claimed to be his wives, ate at the separate table of each about one-third of the time, and had no other home or dwelling place; and that it was not necessary to inquire into the privacy of his sexual relations with either of them. Upon this construction of the word "cohabit," the conviction of Cannon was affirmed by the Supreme Court of the United States last December, and a mandate was accordingly sent down to the territorial court directing its judgment to be carried out. But in April last three cases of "*Apostle Snow*" came before the Supreme Court of the United States on writs of error. Snow had been convicted in the District Court of Utah on a state of facts very different from the facts in Cannon's case; the Supreme Court of the Territory had affirmed the conviction, and Snow was and is now serving out accumulated terms of imprisonment in the penitentiary imposed by the sen-

tence. He is a man upwards of 70 years of age, of blameless life, in all respects a man of education and culture, and one of the first citizens of the Territory. It appeared in evidence that he had seven wives then living, to whom he had been married at different times in the course of the past forty years. Six of these marriages took place before the act of 1862 had made polygamy bigamy, and the seventh took place eleven years before the act of 1882 created the new offence of cohabitation with more than one woman. Before the act of 1882 went into operation, Mr. Snow had dwelt exclusively, in every sense of cohabitation, with his youngest wife and her children, in a separate house which he built for her; his other and older wives, some of them quite elderly women, lived in separate houses with the children of each of those who had children. Mr. Snow's whole association with any of the wives, excepting the youngest, consisted in occasional visits to them, always in the day-time and in the presence of any one else who happened to be in the house, continuing to support and care for them, and looking after the welfare of their children, whose father he was. This state of things continued through the whole of the several periods for which he was indicted in three separate indictments for unlawful cohabitation with more than one woman. He was convicted because he spoke of the other women as his "wives," when, according to his faith and theirs, he had married them for time and eternity, and because the territorial court, by a forced construction of the statute, instructed the jury, composed exclusively of "Gentiles," that they were to presume cohabitation although the fact might be that he had no sexual intercourse with any wife but the one in whose house he dwelt. It is manifest that this conviction under this artificial construction of the law could not take place without violating his religious freedom, because his whole conduct toward all the women evinced plainly that it was dictated by his religious belief in his eternal relation to them as one of religious and moral duty, and because it was

clearly proved at the trial that in the sexual sense he had not cohabited with any wife but the youngest during the periods covered by the respective indictments.

When the extraordinary ruling of the territorial court came before the Supreme Court of the United States the judges were impressed by the fact that they had really to ask and answer the question whether the law required these men to renounce every possible relation to these women, whom they had married for time and eternity, before there was any law on the subject of polygamy or cohabitation, and to turn them and their children adrift upon the world. The enormity and cruelty of such a construction became apparent. But after Mr. Snow's cases had been argued and taken under advisement, a doubt arose among the judges whether they had appellate jurisdiction in this particular class of cases coming up from the Territories. The appellate jurisdiction has not been expressly and directly conferred by any one statute, but it was believed that it could be fairly made out by collating different statutes. The Government wished the Supreme Court to settle all the questions arising under the laws of 1862 and 1882, and therefore the Attorney-General raised no question of jurisdiction. Of course it was not the duty of Mr. Snow's counsel to raise that question. But, apparently because the Court perceived that they had made rulings in Angus M. Cannon's case which they ought to reconsider, and because they could not find that they had appellate jurisdiction, they dismissed the Snow cases for want of jurisdiction, recalled their mandate in the Cannon case, and dismissed that writ of error also for the same reason. This left the act of 1882 without any construction whatever by the supreme judicial authority, and left in the penitentiary some of the most considerable citizens of Utah under convictions obtained in the territorial court by a forced construction of a statute which created a new offence in a very peculiar state of things. This is a somewhat extraordinary situation of affairs; one that can only be remedied by an act of Con-

gress giving appellate jurisdiction to the Supreme Court of the United States in this very peculiar class of cases which involve the question of "cohabitation."

You, Mr. Secretary, will not be likely to misunderstand me ; but, in order that others may not, I shall now refer to the memorable controversy which took place thirty years ago in regard to the legislative power of Congress over the Territories. In 1857 I took part in the re-argument of the Dred Scott case before the Supreme Court of the United States. One of the specific questions on which a re-argument had been ordered by the Court related to the constitutional validity of the Missouri Compromise restriction which interdicted the existence of slavery in the whole of the territorial possessions of the United States north of the parallel of 36° 30'. On the southern side of this question the contention was that, as all territory was the common property of the Union, a citizen of a slave-holding State had the same right to take his slave property into a Territory, and hold it there as property so long as the country remained a Territory, that a citizen of a free State had to take any other kind of personal property into a Territory and hold it there as property during the same period. Against this contention it became my duty to maintain the two following propositions :

1st. That Congress has a plenary legislative power over all the relations of social and civil life in a Territory of the United States, and can allow or prohibit the existence within the Territory of any domestic institution or relation as it may see fit.

2d. That Congress may discriminate between the kinds of property which it will allow or prohibit in a Territory.

This is now familiar and unquestioned constitutional law ; but thirty years ago it was strenuously disputed, and few persons who were not in mature life at that time, or have not since studied the history of that exciting period of sectional controversy, are aware of the formidable difficulties which attended the true solution of this question. But it is now to

be assumed as a fundamental truth which no one controverts, that so long as a Territory of the United States remains a Territory the relations of social and civil life therein are under the government of Congress; but that any legislation respecting them is to be controlled by those prohibitory clauses of the Constitution which limit the legislative power of Congress wherever it is exercised.

But now let it be supposed that, in addition to prohibiting the introduction of slave property into a Territory, Congress had gone a step further and had made it a penal offence, punishable by fine and imprisonment, for any inhabitant of a Territory to be interested in slave property in any State of the Union. It is at once obvious that such a law would have transcended the legislative power of Congress, because it would have encountered a personal right to hold in a slave-holding State a species of property then perfectly lawful in the limits of that State, and because the Constitution of the United States gives to Congress no legislative authority over the property of inhabitants of a Territory unless that property is itself within the Territory.

I have suggested this illustration of the limits of Congressional authority over the relations of social and civil life in a Territory because, in the existing legislation of Congress on the subject of polygamy in a Territory of the United States, there is some analogy to the legislation which I have hypothetically assumed to have been adopted in regard to slavery. I shall presently point out how this analogy is important to be observed, because it takes us into the domain of religious liberty just as the supposed case of legislation respecting slavery would have taken us into the domain of civil liberty in the then condition of the Union.

Let it be remembered then, once for all, that I make no question of the power of Congress to prohibit in a Territory of the United States the social and civil relation known as polygamy, or plural marriage; and it makes no difference, in my view, whether those who contract plural marriage do so

from a sense of religious obligation or conviction of a Divine permission, or from any other motive. But it is one thing for Congress to have a constitutional power to prohibit a relation, and another thing to apply that power in a way to transcend and violate the constitutional rights of individuals. It was perfectly competent to Congress to prohibit the holding of slave property in a Territory. It would have been entirely unconstitutional for Congress to punish an inhabitant of a Territory for holding slave property in a State where such property was lawful. It is in my opinion perfectly constitutional for Congress to prohibit polygamous marriage in a Territory of the United States, and perfectly unconstitutional for it, in order to break up the institution or practise of polygamy, to apply punishments and penalties that violate the religious rights of individuals. This distinction is of the utmost importance, and I trust that it may be kept in view throughout all the criticisms that I shall make upon the existing legislation and the judicial interpretation that it has received in the territorial courts of Utah.

There is another distinction on which I must equally insist. The religious liberty that is guaranteed by the first amendment of the Constitution is not a liberty to do acts which the legislative authority deems injurious to the welfare society, but it is a liberty to hold any religious opinions that the individual may see fit to hold, and to carry out those opinions in any conduct that does no harm to others. Upon this distinction it is no violation of religious liberty for Congress to enact that in a Territory of the United States monogamy alone shall be a lawful relation between the sexes notwithstanding the religious belief of the parties that polygamy is commanded or permitted by the Divine law. The legislative authority of civil government may make any conduct *malum prohibitum*, may prohibit any relation between individuals, provided that authority determines the conduct and relation to be against the public welfare. But, on the other hand, the civil authority can constitutionally interdict or punish no conduct

and no relation between individuals which is both dictated by a sense of religious duty and is at the same time innocent in itself and in its consequences.

When the first amendment to the Constitution declared that—

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF;—

It meant to make two things constitutionally impossible : 1st. To make it impossible for Congress to establish any national religion, or any religion to be supported or upheld by the Federal authority ; 2d. To make it impossible for Congress to prohibit the free exercise of religious beliefs. There is no difficulty whatever in determining the meaning of this last provision. The " free exercise " of religion comprehends the holding of any religious belief, and the doing of any act dictated by that belief which is in itself and its consequences innocent or praiseworthy. To prohibit the free exercise of religion is to make a law which prevents individuals from carrying out in their lives those religious beliefs which dictate or lead to actions in no way injurious to society.

Perhaps it will be asked why, upon the concession that Congress may prohibit polygamy in a Territory, notwithstanding the religious belief of those who practise it that it is commanded or permitted by the Divine law, it is not equally competent to Congress to punish any kind of conduct that Congress may deem it necessary to suppress in order to put an end to polygamy ? I propose to answer this question by examining the existing legislation on the subject of polygamy and cohabitation, and the judicial interpretation that has been given to it in the territorial courts of Utah.

It is to be remembered that from the time of the great exodus of the Mormons from Illinois and their settlement near the Great Salt Lake in 1847, carrying with them the practice of plural marriage, openly, and in full view of the

people and Government of the United States, down to the year 1862, a tacit toleration was given to this feature of their civilization. This toleration was at first extended to it because of their remote situation in a region where it was not supposed that the civilization of the rest of the country would be affected by it, and where it was assumed they would form a community by themselves. I speak now of the toleration evinced by the absence of any legislation on the subject for a period of fifteen years, and by the relations that subsisted between these people and the Government and people of the United States during all that period. Not only did those of them who had contracted plural marriages before their emigration carry their plural wives with them and continue the relation after the settlement in Utah, but such marriages were greatly multiplied after the settlement, and the descendants of such marriages now form a large part of the Mormon population of the Territory. Moreover their leader, Brigham Young, the official head of their Church, a man known to the whole country as having many wives, was appointed by the Government of the United States, in 1850, governor of the Territory, and held that office for seven years. It was not until the year 1862 that Congress took any notice of the polygamy existing in Utah by any legislation whatever. In that year a statute was passed which made polygamy in any Territory bigamy, and punished it as such by fine and imprisonment. That this statute, in relation to marriages contracted before it was passed, was open to the objection that it was an *ex post facto* law, would seem to have admitted of no doubt among lawyers outside of Utah, but it has been considered that it was not liable to this objection. In Utah the Mormons believed from the first that this law was unconstitutional upon this and also upon another ground, namely, that as plural marriage was an article of their religious belief Congress could not constitutionally prohibit it. This was a mistake; but it was not until a later period that it was found to have been a mistake. It was a very honest

and a very natural one, for these people had been for a long time sincere believers in a revelation which sanctioned plural marriage as a celestial relation, and they had seen a tacit toleration extended to their belief and their practice by the Government and the people of the United States for a period of fifteen years after they became subject to the paramount and exclusive legislative authority of Congress. Very few prosecutions for polygamy were instituted in Utah under the act of 1862.

But after the lapse of twenty years the law of 1862 was amended by the act of March 22, 1882, which has been called the "Edmunds act." This act re-enacted the provision of the act of 1862, which made polygamy bigamy, and it also created a new offence, described in its 3d section as "cohabitation with more than one woman," punishing the new offence by fine and imprisonment, as penalties entirely distinct from those inflicted for bigamy or plural marriage. Under this new provision, a man who had married two or more women, but who had ceased to live with all of them but one, in the sexual relation of husband and wife, might be convicted of and punished for the unlawful "cohabitation with more than one woman," according to the construction that should be given to this one word "cohabit."

If Utah were a State, its inhabitants might reasonably be required to submit to the interpretation of their own laws by their own tribunals. But Utah is not a State. It is a Territory of the United States. The inhabitants do not make the judges, and they did not make the laws in question. To deny to them all means of having the rulings of the local judges on acts of Congress revised by the Supreme Court of the United States, when those rulings affect their dearest civil and religious rights, is neither reasonable, politic, humane, or just.

It is a very remarkable circumstance that Congress should have created a new offence by a statute designed to apply to a very peculiar and unprecedented condition of social and

domestic relations without any legislative definition of the offence. When new legislation is resorted to in regard to crimes that have long had a settled meaning, such as burglary, theft, arson, forgery, and the like, it may well be left to judicial interpretation to determine in particular cases whether the facts proved in evidence constitute the crime. But when it is intended to make an entirely new crime or misdemeanor, to give no legislative definition of it, and to describe it by a single word which admits of different meanings, is certainly very extraordinary. In the so-called "Edmunds act," the meaning of the word "cohabitation" or "cohabit" was left entirely to judicial interpretation; and the consequence has been that in the territorial courts of Utah this word has received an interpretation so strained, artificial, and arbitrary, that prosecutions under this section of the statute have become persecutions, and men have been convicted and punished for conduct that was not only innocent, but was of such a nature that a man would have been guilty of the greatest moral wrong if he had omitted or neglected to do the very things for which he has been sent to the penitentiary. But this is not the worst of it, for by omitting to provide for the appellate jurisdiction of the Supreme Court of the United States, in cases arising under this 3d section of the Edmunds act, Congress left the persons who might be convicted in the territorial courts without any possible means of testing the correctness of their rulings by the judgment of the highest tribunal in the land. Nothing could be more cruel in operation, considering all the circumstances, although it was doubtless an unintentional oversight. I am far from imputing to Congress any deliberate indifference to the dictates of justice in the cases of the unfortunate Mormons who had to determine what they should do with their wives and children, and who, do whatever they might, would be exposed to forced and arbitrary constructions of the law by the final rulings of the territorial courts. But it is none the less my duty to point out this omission and to urge that it be remedied without further delay.

But now it is necessary for me to explain how it has come about that citizens of Utah, of irreproachable lives, many of whom are the most considerable and the most worthy inhabitants of the Territory, men to whom the Territory largely owes its prosperity, men perfectly loyal to the Federal Government and honestly meaning to obey its laws, are now undergoing punishment in the penitentiary because they would not violate their convictions of religious and moral duty. Let it be distinctly understood that these men are not undergoing punishment as bigamists. They have not been prosecuted and convicted for having married more than one wife. They have been prosecuted and convicted for the separate offence which consists in *cohabiting* with more than one woman; and they are suffering punishment as felons upon a judicial interpretation of this offence which is perfectly arbitrary and unnatural without any means of procuring a revision of that ruling in the highest branch of the Federal judiciary. By this forced construction of the statute they are punished for acting according to their convictions of religious and moral duty; a result which Congress could not have intended, or which, if it was intended, Congress could not constitutionally effect.

Let no one say that I am undertaking a defence of polygamy. Let no one say that I am disposed to set up religious beliefs or individual convictions of the law of God against the law of the land. There is, I repeat, but one measure of the civil obligations of men in civil society whatever may be their religious beliefs. To obey the requirements imposed by the authority of the legislative power is the first duty of the citizen, and nothing but a successful revolution which overthrows the authority can absolve him from that duty. But under our system of government that authority is not an unlimited one; and one of the most important of its limitations is that which forbids Congress from making any law prohibiting the free exercise of religion. The construction given to the 3d section of the Edmunds act by the territorial courts

of Utah makes it violate directly and palpably the first amendment of the Constitution.

It would seem to be a very plain proposition that when a statute, dealing with marital relations and making polygamous unions bigamy, creates a separate offence of cohabitation with more than one woman, it must have meant to denounce the conduct of a man who lives with more than one woman in sexual intercourse. Cohabitation of a man with two women, or the dwelling in the same house with two women without sexual intercourse with either of them, could not be reasonably held to be an offence in determining the meaning of a penal statute, for without the fact of sexual intercourse there could be nothing to punish. Thousands of men in all communities dwell under the same roof with more than one woman, necessarily and innocently. But the 3d section of the "Edmunds act" has been very strangely construed. It has been held that cohabitation does not mean the dwelling in the same tenement with more than one woman; that it does not mean the living in sexual intercourse with more than one woman; but that it means every kind of association, although limited to acts of mere kindness and to pecuniary support, provided the women have at some time been united in marriage with the man who is prosecuted.

According to the construction of the territorial courts, a man may live in the same house with two or more strumpets, and may have sexual intercourse with all of them; yet, he is not indictable for unlawful "cohabitation" under the 3d section of the "Edmunds act." That section is held to have reserved all its terrors for the man who has been united in holy wedlock with more than one woman, according to a system of religious belief that extends the relation through all eternity; and if, in the belief that he owes to them certain duties in this life, he continues to care for their welfare, although they no longer stand to him in any but the moral and spiritual relation in which they all believe, he must go to the penitentiary. This is the most exquisite *reductio ad absurdum* that I have met with in my juridical studies.

Let it be supposed that a conscientious and religious man had innocently married a woman who was within the prohibited degrees of consanguinity, and that the fact had not been discovered until after children had been born. The marriage would be invalid ; the children would be illegitimate ; perhaps they would be offspring of an incestuous connection. Will any one undertake to say that that man owed no duties to that woman and to his unfortunate children ? Would a law that should consign him to the penitentiary, not because he had married the woman, but because he continued to provide for her and her children after the marriage had been found to be invalid, be anything but a barbarous enactment ? Would not a court, which should so interpret the doubtful language of a statute as to punish that man for discharging a plain duty of moral obligation, be justly amenable to censure for having made a forced and unreasonable construction ?

Take another illustration : Illicit sexual intercourse is an offence against the law ; the offspring of such intercourse are bastards. Nevertheless, does a man owe no duties to a woman who has been his mistress, and to an illegitimate child that she may have borne to him ? And if he discharges that duty to the mother and to the child, according to the dictates of his conscience, is he to be sent to the penitentiary ?

Let a corresponding question be put in relation to the Mormon husbands of plural wives whom they married before there was any law in Utah prohibiting such marriages. No incestuous, no illicit, no immoral stain rests upon the original connection. It was purely voluntary ; a second wife is never married without the consent and approbation of the first. If it is a third marriage, the consent and approbation of the two wives previously married are essential, according to a cardinal doctrine of the Mormon faith. Now add the farther element that, according to the religious belief of all the parties, the marriages are entered into for time and for eternity, constituting a religious bond of never-ending obligation. The marriages become civilly void by a subsequent statute, and

the husband is made liable to punishment for bigamy. He is not prosecuted for the bigamy, but he is prosecuted for "cohabiting" with more than one woman, when the whole "cohabitation" consisted solely in discharging towards the women duties of plain religious and moral obligation. It is difficult to write or to think of such outrageous perversions of justice and preserve one's equanimity.

I now pass to one of Governor West's recommendations, which I have read with astonishment. He calls for an army in the following paragraphs of his report :

"I know of no armed organization for the purpose of opposing the lawful authorities or resisting the enforcement of the laws, nor do I believe any such now exists. The process out of the courts is met with no physical resistance, and society is peaceable, and no outbreaks have occurred since I came to the Territory. It is true, however, that a large majority of the people stoutly and stubbornly affirm, publicly and privately, that the enforcement of certain laws is destructive of their rights as freemen, an assault upon their religion, and an invasion of the sanctity of their homes. The minority with equal vigor and openness proclaim that the practices of those people are immoral; that they are disloyal to the Government, and that their attitude of defiance to the laws interferes with the advancement and prosperity of the Territory, and inflicts injury upon all of its interests.

"It follows necessarily that the people here with a bitterness of feeling are divided as they are nowhere else in the country. The division is clear, distinct, and palpable.

"The causes of division, in language not distinguished for its mildness, are constantly, earnestly, and vehemently discussed through the press, in the houses of worship, court-houses, hotels, business places, on the streets, and in the social circle, engendering an intense feeling of bitterness. The vigorous enforcement of the unpopular laws against the people in the majority, with a prospect of further stringent legislation, does not tend to soothe or make them more amiable. Under the favorable conditions existing for such a result, an outbreak of violence might be easily provoked.

"There is no militia here to appeal to, as there is in other well-ordered States, to suppress violence, maintain order, and enforce the law. Even with authority conferred to organize a militia force, I am of the opinion that with the feeling existing here a better reliance for the preservation of the public peace would be found in regular troops.

"The statement of the situation makes apparent the need that may arise at any time for the prompt use of a strong, well-disciplined, and efficient military force to aid the civil power. I would recommend that such a force of United States troops be placed and kept in garrison in this Territory, and that such laws may be passed as will make them as promptly available to the civil authorities here in suppressing violence, quelling disorder, and aiding in the execution of the process of the courts as if they were the militia of the Territory. The exhibition of the strength of the arm of power will often obviate the necessity for its use."

I have seen, in the course of my life, a law of the United States executed in a community where it was exceedingly un-

popular, where four-fifths of the people believed it to be unconstitutional, and where many felt it to be an outrage upon their sense of duty to God and their fellow-men. That people could have been pronounced as "hostile to the laws" just as truly and rightfully as the Mormons can now be, and in my judgment far more correctly. Suppose that after the enactment of the Fugitive Slave Law in 1850, President Fillmore had stationed an army on Boston Common to aid the marshal in the enforcement of that law. Its guns would have been in full sight of a State Capitol, in which sat a Legislature known to be hostile to the execution of the obnoxious statute. There were multitudes of men ready to follow the lead of anybody in resisting the process of the Federal tribunals. Notwithstanding all this the President ordered no troops to Boston; the marshal executed process without the aid of the army, and all he asked was that the local authorities would preserve the peace of the streets, which was done by the State militia.

But Governor West says that Utah has no militia, or none that he dare organize or could rely upon. He therefore calls for a portion of the army to aid the civil authorities in the execution of process. But why is this necessary? He knows of no armed organization for the purpose of resisting the laws, and does not believe that any such now exists. He might have learned that non-resistance by physical force is one of the fundamental doctrines of the religious faith of the Mormons; that they put their trust in God and His providence, and not in the arm of flesh. This is the grand reason why he finds "society peaceable" in that Territory, and that "no outbreaks have occurred" since he went there. He will find it so to the end. Nevertheless he says, what is perfectly true, but it has become so unnecessarily because of the policy that has been pursued, that there is an inflamed state of feeling between the Mormon majority and the Gentile minority, and that, "under favorable conditions existing for such a result, an outbreak of violence may be easily provoked." I have no

doubt of it ; but the provocation will never come from the Mormons. A brutal deputy-marshal can at any time provoke an outbreak of *individual* violence. Human nature cannot bear everything. Men cannot bear to have their wives and sisters and daughters treated as I have too much reason to believe Mormon women of Utah have been treated by Federal officials, or by men claiming to be such. These things, Mr. Secretary, deserve close scrutiny before an army is sent to Utah to prevent outbreaks of violence. With unaccountable stupidity and carelessness the British government suffered the religious prejudices of the native troops of India to be violated and shocked by an unnecessary requirement of discipline. The Sepoy rebellion was the consequence. Who gave that provocation ? I allude to this incident because it teaches a great lesson ; but at the same time I am persuaded that nothing whatever is needed to reconcile the whole Mormon population of Utah to a cheerful feeling towards this Government but to open freely the avenue to the Supreme Court of the United States for every construction of the laws that affect their peace, and in the meantime to pursue towards them a policy, which, while it shall be firm will also be humane. I cannot permit myself to doubt that it is the wish of the executive to pursue such a policy. ●

Another of the Governor's recommendations is that the Constitution be so amended as to prohibit every State from ever establishing or allowing polygamy. This is the same project that has been proposed by the Judiciary Committee of the present House of Representatives. The Governor advocates it because, among other reasons, it would give notice to all emigrants who are Mormons that they can never, by becoming the majority of people in any State of this Union, establish polygamy in such State. There is no necessity whatever for such an Amendment, and its agitation would be entirely inexpedient. No State is likely to come under Mormon control. No State will ever be likely to admit anything but monogamy as a lawful relation. For purposes of notice

to foreigners coming here from other countries, such an amendment of the Federal Constitution is wholly unnecessary. They know now that no State tolerates polygamy, and that the Federal Government does not now allow of it in the Territories. But the conclusive objection to the proposed amendment, aside from its being unnecessary, is that the regulation of the marriage relation is one of those things that belong in the mass of powers expressly reserved to the States by the 10th Amendment, and the amending power does not extend to the deprivation of any one of those powers, in the case of any State, without its consent, even although every State in the Union should adopt the Amendment excepting one that might refuse. There is not a State in the Union that would consent to surrender to Congress its power to regulate the domestic institution of marriage. Certainly no State ever should consent to do so.

I have now a very few observations to make upon the recent report of "the Utah Commission." This, I understand, is a body of Federal officers, appointed under the "Edmunds act," and charged with the duty of carrying out such disfranchisement of polygamists, bigamists, and men cohabiting with more than one woman, and women cohabiting with such men, as is directed by that act. I do not find that the law under which these officers were appointed makes it their duty to recommend legislation, but perhaps there may be something in their instructions which requires them to do so. Be this as it may, the importance and value of their recommendations are what I presume to be of chief consequence to the Secretary of the Interior, to the President, and to Congress. There is one thing very prominent in their report to which I desire to invite your special attention. They brand the Mormon population of Utah as "religious fanatics;" and they say that "the Government has to deal with a people who are wonderfully superstitious and fanatically devoted to their system of religion." This is put forward as a kind of motive for additional legislation, and as a

reason for not expecting that polygamy will be suddenly or speedily exterminated.

Individuals who differ from each other on any subject of religion may call each other "fanatics" if they are so disposed. But a government which undertakes to treat any portion of its subjects as "fanatics," or to shape its measures towards them on the assumption that they are "wonderfully superstitious," is on the high road to religious persecution, and will sooner or later end at that goal. If I had an opportunity to do so, I should like to ask the Hon. Commissioners to be good enough, as public officers or Government advisors, to define "fanaticism" and "superstition." I rather think that the effort would end in the sort of definition that makes "orthodoxy my doxy, and heterodoxy your doxy." I know of no attitude, tone, or assumption that can be rightfully adopted by the Government of the United States towards the religious beliefs of any persons who are subject to its authority, excepting to acknowledge their absolute and equal right to hold any religious opinions that they see fit to hold, subject only to the right of the civil power to control those actions which are forbidden by reason of the fact that the public welfare requires that they be not allowed. I imagine that a statute, directed against certain religionists, and assuming that they are "fanatics," would wear an aspect that most men of sense would consider ridiculous. If the prohibited conduct has its origin in a religious belief, we may punish the conduct because it is hurtful to society. But if we mingle with the enactment or the policy the idea that the religious belief is a "fanaticism," we shall inevitably end in doing what we have no right to do.

The Commissioners recommend the enactment of laws which will "forbid the immigration of all aliens into the United States who are polygamists, or who uphold polygamy by their profession." The Governor, too, favors laws that "will put a stop to this immigration [of Mormons] until these people become submissive and recognize their responsibilities under the law." I can conceive of no way in which this can be done,

excepting to pass a law stationing officers at our ports of entry, and authorizing them to interrogate every alien who shall offer to land, whether he or she holds that polygamy is a relation sanctioned by his or her religious belief. If the answer is an affirmative one, the immigrant must be turned back. Such a law, if it should be enacted, must at once be subjected to a judicial test of its constitutional validity.

But there is no necessity for, or sense, or expediency in, attempting to check this immigration. While the Mormons who come here from abroad naturally go to Utah, when they arrive here they know, and they have known before, that polygamy is prohibited there by law. They become a charge to nobody but those of their own faith who choose to aid them by well-conducted systems of advancing a part of their travelling expenses. They are almost always thrifty and industrious people, capable very soon of taking care of themselves. They are people whose immigration it is not desirable to discourage for any reason but their religious faith ; and when we once enter upon the policy of discriminating against the religious faith of immigrants who are of the same races as ourselves, where do our statesmen and legislators suppose that we shall stop ?

I can conceive of a policy very different from that which has been followed of late, and is now proposed to be supplemented by still more stringent measures ; and I will sketch one that would, as I believe, strongly tend to bring polygamy to an end.

1st. Men who married plural wives before there was any law prohibiting such unions, but who, since that law went into operation, have confined their sexual relations to one of their wives, should not be prosecuted or punished at all under that section of the statute which makes polygamy bigamy so long as they maintain with all of their wives, but one, no other than the relation of protecting friends. Belief, or the profession of belief, in the eternity of the moral and spiritual tie, is a perfectly unfit and improper matter to be interfered with by the civil power.

2d. Men who married plural wives after such unions were prohibited by law should be required, after conviction of bigamy, to give security that they will confine their sexual relation to one of their wives, and that woman should be registered as the admitted wife of that man.

3d. Neither of the above classes of men should be prosecuted or molested under the 3d section of the statute for unlawful cohabitation on account of any association with the plural wives that is not sexual, or on account of any recognition or profession of the religious and moral tie which the parties all believe to be for time and for eternity.

4th. In order to have the 3d section of the Edmunds act, in cases where convictions have been had under it, receive construction by the Supreme Court of the United States, provision for that purpose should be made at once by law.

5th. In order to carry out this policy, let there be detailed from the Department of Justice some suitable person as special counsel to proceed to Utah under proper instructions, authorizing him to take charge of all prosecutions under the Edmunds act now pending, or that may be instituted for one year, with authority to direct the district attorney in such cases, and to supervise the administration of the law under the control of the Attorney-General.

The adoption of such a course as this would supersede all necessity for measures respecting the Mormon Church, or respecting immigration or the employment of a military force; and it would, aided by known differences of belief among the Mormons in regard to plural marriage, put an end to polygamy in no very long time. For it is beyond question that, while the older Mormons believe plural marriage to be a religious duty when circumstances favor it, the younger members of the denomination regard it as permitted but not required by the Divine law, and consequently very few of the younger men have married more than one wife. We have only to exercise a little patience and refrain from persecution, and we may look to see polygamy die a natural death at no very distant day. We do not need to

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